Michael Brian Davis v Microsoft Malaysia Sdn Bhd

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–83 OF 2002
WAN AFRAH JC
19 FEBRUARY 2004

Labour Law — Employment — Termination of employment — Applicant unfairly dismissed — Whether applicant entitled to reinstatement — Whether applicant entitled to back wages — Whether applicant entitled to stock options — Whether stock options in contract of employment with respondent

The High Court issued an order questioning Industrial Court Award 276/1999 and inter alia held that the dismissal of Michael Brian Davis ('the applicant') by Microsoft Malaysia Sdn Bhd ('the respondent') was without just cause and remitted the matter to the Industrial Court purely to decide on the appropriate remedy for the applicant. The said 'remedy' hearing proceeded in the Industrial Court. The applicant applied that he should be reinstated and compensated for the losses of benefit derived from the stock options and the respondent stated, inter alia, that the court should only award the balance of the salary for the 15½ months of the unexpired term and that the applicant was not entitled to the grant as the applicant had beenterminated. The Industrial Court held that reinstatement was not appropriate, awarded the applicant back wages and stated that the issue about the stock options should be considered in a court of law. The applicant submitted an application for an order of certiorari to quash the second part of the Industrial Court's award, ie the failure of the chairman of the Industrial Court to grant compensation in respect of the stock options. The stock granted to the applicant were shares in Microsoft Corporation USA. Counsel for the applicant argued that the applicant was merely seeking to be compensated for all losses which arose directly from his unfair dismissal and that the shares were those of Microsoft Corporation USA was irrelevant. Counsel for the respondent stated that there was no contract on such an entitlement to the applicant and that the applicant had conceded that he was not entitled to the benefit contractually and that there was no privity of contract on the stock options between both parties.

Held, dismissing the applicant's application with costs:

(1) The application was devoid of merit when the applicant had conceded during the cross examination that he was not contractually entitled to the stock options the minute he left employment with the company. A perusal of the applicant's contract of employment with Microsoft Malaysia showed there was no provision of the stock options benefit offered to him (see paras 22 and 23).

(2) The stocks that were granted to the applicant were shares of Microsoft Corporation. A perusal of the two trenches of stock options received by the applicant showed that it was granted directly by Microsoft Corporation. This was confirmed by applicant himself during the cross examination. The applicant agreed that Microsoft Corporation

held the prerogative with respect of the granting of the stocks. This was also confirmed by the respondent's witness that Microsoft Malaysia did not have the legal right to grant the stock options nor were they involved in anyway in the administration of the grant (see para 24).

[**Bahasa Malaysia summary**

Mahkamah Tinggi telah mengeluarkan perintah menyoal Award Mahkamah Perusahaan 276/1999 dan telah, antara lain, memutuskan bahawa pemecatan Michael Brian Davis ('pemohon') oleh Microsoft Malaysia Sdn Bhd ('responden') telah dilakukan tanpa alasan yang saksama dan telah meremitkan perkara itu semula ke Mahkamah Perusahaan untuk memutuskan remedi yang sesuai untuk pemohon itu. Pendengaran 'remedi' ini telah diteruskan di Mahkamah Perusahaan. Pemohon telah memohon untuk dikembalikan semula kerja beliau dan diberi pampasan untuk kerugian faedah yang diperoleh daripada opsyen saham dan responden telah menhujah, antara lain, bahawa mahkamah hanya patut baki gaji beliau untuk 15½ bulan tempoh yang belum habis dan bahawa pemohon tidak berhak mendapatkan pemberian itu memandangkan beliau telah dipecat. Mahkamah Perusahaan telah memutuskan bahawa pengembalian semla kerja tidak sesuai, memberikan award gaji belakang kepada pemohon dan berkata bahawa isu opsyen saham patut dipertimbangkan di dalam mahkamah undang-undang. Pemohon telah memohon satu perintah certiorari untuk membatalkan bahagian kedua Award Mahkamah Perusahaan, iaitu kegagalan Pengerusi Mahkamah Perusahaan untuk memberi pampasan ke atas opsyen saham itu. Saham yang diberikan kepada pemohon adalah saham di dalam Microsoft Corporation USA. Peguam untuk pemohon berhujah bahawa pemohon hanya menuntut pampasan untuk segala kerugian yang berbangkit terus daripada pemecatan tidak saksama beliau dan bahawa saham-saham itu merupakan saham Microsoft Corporation USA tidak relevan. Peguam responden berkata bahawa tiada perjanjian di atas hak itu kepada pemohon dan bahawa pemohon telah mengaku sendiri bahawa beliau tidak berhak kepada faedah itu di dalam kontrak dan bahawa tiada priviti kontrak mengenai opsyen saham itu di antara kedua-dua parti itu.

Diputuskan, menolak permohonan pemohon dengan kos:

(1) Permohonan ini tidak bermerit memandangkan pemohon telah mengaku semasa disoal balas bahawa beliau berhak di dalam kontrak kepada opsyen saham itu semasa beliau berhenti bekerja dengan syarikat itu. Satu penelitian perjanjian pekerjaan pemohon dengan Microsoft Malaysia menunjukkan bahawa tiada peruntukan menunjukkan opsyen saham ditawarkan kepada beliau (lihat perenggan 22 dan 23)

(2) Saham-saham yang diberikan kepada pemohon merupakan saham Microsoft Corporation. Satu penelitian ke atas opsyen saham-saham yang diterima oleh pemohon menunjukkan bahawa ia diberi terus oleh

Microsoft Corporation. Ini telah disahkan oleh pemohon sendiri semasa disoal balas. Pemohon telah bersetuju bahawa Microsoft Corporation memegang prerogatif pemberian saham-saham itu. Ini juga telah disahkan oleh saksi responden bahawa Microsoft Malaysia tidak mempunyai hak undang-undang untuk memberi opsyen saham ataupun terlibat di dalam pemberian itu (lihat perenggan 24)]

Notes

For cases on termination of employment, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1070-1140.
For termination of employment generally, see 7 *Halsbury's Laws of Malaysia* (2003 Reissue).

Cases referred to

Lim Seng Huat lwn Fiamma Sdn Bhd [1996] 3 MLJ 604 (refd)

Anand Ponnudurai (Bodipalar Ponnudurai Nathan) for the applicant.
Suganthi Singam (Sheam Delamore & Co) for the respondent.

Wan Afrah JC:

BACKGROUND OF THE CASE

[1] The High Court had issued an order on 18 April 2000 questioning Industrial Court Award No. 276/1999 and inter alia held that the dismissal of one Mr Michael Brian Davis ('the applicant') by Microsoft Malaysia Sdn Bhd ('the respondent') was without just cause and remitted the matter back to the Industrial Court purely to decide on the appropriate remedy for the applicant.

[2] Pursuant to the said order, the matter was remitted and recommenced as Industrial Court Case No. 5/4-524/00. The said 'remedy' hearing proceeded in the Industrial Court on 18 May 2000.

[3] Before the Industrial Court, the applicant had prayed for an order of reinstatement without loss of all benefits whatsoever. In this regard, the applicant's main contention was that he should be compensated for the loss of the benefit derived from the stock options since such loss was a direct result of the respondent's unlawful conduct.

[4] The respondent however on the other hand made the following submissions:

(a) reinstatement ought not to be ordered;

(b) the court should only award the balance of salary for the 15½ months of the unexpired term;

(c) that the applicant's loss for the stock options should not be entertained on the basis that the respondent was not a party to the grant and that the applicant was not entitled under the grant as his services have been terminated.

THE AWARD BY THE INDUSTRIAL COURT

[5] Following written submissions by both the applicant's and respondent's solicitors, the Industrial Court handed down its Award No. 450/2002 dated 30 May 2002. The Industrial Court in essence from paras 1-32 of the said Award held as follows:

(a) reinstating the applicant was not appropriate;

(b) the court awarded the applicant back wages for the unexpired 15½ months of his contract amounting to USD109,791.

[6] Whereas, pertaining to the issue of the stock options the learned Chairman of the Industrial Court in his Award (referring to the paras 33-44) concluded as follows:

> 43 The only clause in the whole contract of employment with this Company that may have relations to this stock options issue could be found under the clause of 'benefit'. However, perusing through the clause which is ambiguous in nature as it does not refer to the stock options specifically, this Court is not able to decipher the object of the clause without the assistance of Counsel. Furthermore, the stock granted to the Claimant were not the shares in Microsoft Malaysia but were of the shares in the Microsoft Corporation in USA.
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> 44 In the absence of any provisions relating to this stock option in his contract of employment with the Company, it is the view of this Court which is a court of equity that it shall not dwell on this question as the right forum would be the court of law.

[7] In particular to the above, the applicant had submitted an application herein for an order of certiorari to quash the second part of the Award (paras 33-44) namely the failure of the chairman of the Industrial Court to grant appropriate compensation to the applicant in respect of the stock options. The order in respect of paras 1-32 of the said Award remains undisputed by both parties.

ARGUMENTS BEFORE THIS COURT

[8] There lies two extreme poles of arguments from the parties involved.

1) Applicant's arguments:

[9] Counsel for the applicant argued that the applicant was not seeking to enforce the stock options against Microsoft Corporation USA but instead, was merely seeking to be compensated for all losses (including stock options) which directly arose out of his unfair dismissal. Hence, the fact that such shares were those of the Microsoft Corporation, were totally irrelevant. In short, the applicant forwarded the claim that the respondent should be held liable to compensate him for such loss of opportunity to exercise his rights to such stock options (as he would have continued to enjoy the benefit) had he not been dismissed unfairly by the respondent and in the course, had caused him such loss.

[10] The applicant's counsel explained that the stock options were a benefit which the applicant was granted within his first six months of employment with Microsoft Malaysia Sdn Bhd. It was reiterated that the applicant had exercised such options at six months interval since his first employment with Microsoft Australia. The said benefit was expressly contained in his letter of appointment then, which refers to stock options in Microsoft Corporations USA shares. The aforesaid benefit continued with him when he was employed by the respondent.

[11] It was further argued that the respondent did not challenge the applicant's evidence of such stock options scheme and benefits obtained by applicant. Neither did the respondent examine and question the applicant on the quantum of loss as claimed by the latter. Based on the overall evidence and circumstances, counsel for the applicant submitted that the applicant is entitled to the future stock options and therefore entitled for the compensational loss of the same — being a direct loss suffered by him as a result of the unlawful termination.

[12] Counsel for the applicant clarified that his client was not asking for specific performance of the said shares and that the privity of contract does not arise. The applicant merely sought compensation for the losses he suffered due to the wrongful action of the respondent.

[13] This court noted that the crux of applicant's matter was:

i) Claim for compensational loss

ii) Respondent is totally liable.

2) Respondent's arguments:

[14] Counsel for the respondent submitted orally before this court, that the issue to be determined is whether the applicant is entitled to the stock options grant. Should the court decide he is entitled, then can he exercise the said benefit.

[15] In the written submission, the respondent's counsel pointed that 'whether a person actually suffers as a result of the termination of employment would depend on whether the person was contractually or legally entitled to the benefit. If the employee was never entitled to the benefit, no loss would have occurred'. A parallel point was referred to the Court of Appeal in the case of *Lim Seng Huat lwn Fiamma Sdn Bhd* [1996] 3 MLJ 604 whereby, the court had quashed the award of bonus included in the compensation awarded to the employee on the basis that the employee was not contractually entitled to it. In the present case, it would follow, on the authority of *Fiamma*, the Industrial Court had no jurisdiction to make any award on the stock option plan when there was no contract on such entitlement.

[16] In supporting the question of entitlement to such benefit, the respondent's counsel pointed that the applicant had conceded that he was not entitled to the benefit contractually. When under cross examination, the applicant had attested the following:

A i) 'Yes! My contractual entitlement of the stock options ended when I left the Company.' (CL-1 p 25).

ii) 'I agree that Microsoft Corporation's condition says that I am not entitled for my rights even if I was terminated without just cause. But this is only with Microsoft Corporation.' (CL-1 p 28 para 10).

B **[17]** It was reiterated by the respondent's counsel that when the applicant had conceded that there was no contractual entitlement to the stock options, it would follow that there would be no basis to claim for losses he allegedly suffered. The applicant's claim henceforth, should be dismissed and rejected by Court.

C **[18]** Following the question of entitlement, this court was drawn to another point that is privity of contract. In the oral submission, counsel for respondent stated that there was no privity of contract pertaining to the stock options scheme entered between both parties. It was clarified that the said scheme of benefit was given to the applicant by Microsoft Corporation of USA. Any number of shares given was very much at the discretion of and granted by Microsoft Corporation of USA. It was clarified that the said benefit was devised by Microsoft Corporation of USA entity and that the applicant cannot hold Microsoft Malaysia Sdn Bhd (which is a separate entity) responsible for the alleged losses. To this, reference was made to the contract of employment between the applicant and the Malaysian entity as well as letter of appointment and the letter granting Microsoft non-qualified stock options by the American entity to the applicant.

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[19] Briefly, the respondent's arguments are as follows:

i) The appellant is contractually not entitled to the benefit.

F ii) It would follow that there would be no basis for the applicant to claim for the alleged losses.

iii) There was no privity of contract on the stock options plan between both parties.

G THE DECISION

[20] I take note that the Chairman of the Industrial Court did not grant the appropriate compensation to the applicant in respect of the stock options. I also take note that in the Award, the Chairman did not make a decision whether the applicant is entitled to the stock options or he should be compensated for the loss of the said benefit as a result of the respondent's unlawful action in terminating his employment.

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[21] Hence, the applicant sought before this court for determination, the appropriate compensation in respect of the stock options benefit.

[22] Having heard submissions from both parties, I am of the opinion that the application is devoid of merit when the applicant had conceded during the cross examination that he was not contractually entitled to the stock options the minute he leaves employment with the company.

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[23] Further, a perusal of the applicant's contract of employment with Microsoft Malaysia shows there is no provision of the stock options benefit offered to him.

[24] The stocks that were granted to the applicant were not shares in Microsoft Malaysia but were shares of Microsoft Corporation. A perusal of the two trenches of stock options received by the applicant showed that it was granted directly by Microsoft Corporation. This was confirmed by applicant himself during the cross examination. In fact, the applicant agreed that Microsoft Corporation holds the prerogative with respect of the granting of the stocks. This was also confirmed by the respondents witness (COW-1) that Microsoft Malaysia did not have the legal right to grant the stock options nor are they involved in anyway in the administration of the grant.

[25] As such, I tend to agree with the respondent's counsel that there is no privity of contract between the applicant and the respondent.

[26] It is my considered opinion where the applicant is not contractually entitled to the benefit and that there is no privity of contract in the first place, hence there is no basis for the applicant to claim for the alleged loss.

[27] As such, applicant's application for certiorari is hereby dismissed with cost, However, if I am wrong in coming to such decision and that the applicant is entitled to the loss he suffered, I would make an order for the matter to be reverted back to a different Chairman to decide on an appropriate compensation since the compensation of the quantum was not fully addressed in the Industrial Court earlier.

Applicant's application dismissed with costs.

Reported by Chew Phye Ken